No. 24-CV-298

In the

District of Columbia Court of Appeals

THOMAS RABON,

Plaintiff-Appellant,

v.

PEPCO HOLDINGS INC,

Defendant-Appellee.

On Appeal from the Superior Court of the District of Columbia
Civil Division in Case No. 2022 CA 003673B
(Honorable Yvonne Williams, Judge)

BRIEF FOR DEFENDANT-APPELLEE

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December 18, 2024

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RULE 28 CERTIFICATE OF PARTIES BELOW

The plaintiff below and appellant, Thomas Rabon, initially appeared *pro se*, and has subsequently been represented at all times by Arinderjit (A.J.) Dhali, including in this appeal. Rabon named as the original defendant "Pepco Holdings, Inc.," which is a non-existent entity. Defendant assumed that Rabon intended to name his employer, Potomac Electric Power Company ("Pepco") as the defendant in this action. Pepco is a wholly owned subsidiary of PH Holdco LLC. PH Holdco LLC is an indirect (third-level), wholly-owned subsidiary of Exelon Corporation. Pepco has at all times been represented by undersigned counsel, Susanne Harris Carnell, of Lorenger & Carnell PLC, including in this appeal.

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JURISDICTION STATEMENT

This appeal timely follows the entry of final judgment on all claims in Pepco's favor by the Honorable Yvonne Williams, Judge, District of Columbia Superior Court, on March 14, 2024 in the matter then captioned *Thomas Rabon v. Pepco Holdings, Inc.*, 2022 CA 003673 B.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Rabon's failure to put forth evidence of the existence of any substantially limiting condition rendered him ineligible to recover under the District of Columbia Human Rights Act ("DCHRA").

2. Whether Rabon's failure on the September 15, 2020 progression test rendered him ineligible to recover under the DCHRA because he was not a "qualified individual."

3. Whether Rabon put forth sufficient evidence of pretext and discriminatory motive such that a reasonable jury could find in his favor on his claim of discrimination in violation of the DCHRA.

4. Whether Rabon put forth sufficient evidence of pretext and retaliatory motive such that a reasonable jury could find in his favor on his claim of retaliation in violation of the DCHRA.

5. Whether Rabon put forth sufficient evidence of pretext and retaliatory motive such that a reasonable jury could find in his favor on his claim of retaliation in violation of the Covid-19 Support Emergency Amendment Act ("CSEA").

STATEMENT OF THE CASE

This case is an employment dispute arising out of Thomas Rabon's March 16, 2021 termination from his Pepco employment. In the proceedings below, Rabon alleged that, by terminating him, Pepco violated the DCHRA's prohibition

on disability discrimination, the DCHRA's prohibition on retaliation, and the CSEA's prohibition on retaliating against individuals who took protected leave under that temporary statute. At the conclusion of discovery, Pepco moved for summary judgment on all three claims, which Judge Williams granted on March 14, 2024, entering judgment in Pepco's favor on all three claims and closing the case. This appeal followed.

STATEMENT OF FACTS[1]

On July 20, 2020, Thomas Rabon began training to be a Helper Cable Splicer Mechanic for Pepco, a position governed by the terms of a Collective Bargaining Agreement ("CBA"). JA 535 ¶¶1-2. The CBA required that Helpers like Rabon take and pass a progression test at the conclusion of their training or be automatically terminated from employment. JA 536-537 ¶¶3-4, ¶6; JA 56-57, Rabon Dep. 91:1-92:1; JA 111-112, Gentry-May Dep. 52:8-53:2, JA 186, Gentry-May Dec. ¶8; JA 208, JA 211. Despite knowing this, Rabon did not request any

[1] This fact summary is primarily drawn from Defendant's Reply Statement of Material Facts Not in Dispute ("Reply Facts"), Joint Appendix ("JA") 535-547, which incorporates Pepco's original statement of facts, JA 28-35 and addresses Rabon's responses, JA 527-534. Rabon admitted 29 of Pepco's 40 facts, failed to respond to another three, and denied only eight: Facts ¶¶ 4, 20, 22, 23, 31, 32, 35 and 39. JA 535-547. Where Rabon admitted a fact in the proceedings below, Pepco will typically cite only to the Reply Fact. Where Rabon ignored or attempted to dispute a fact, Pepco will cite to its Reply Fact and to the relevant evidence. As set out in the Reply Facts, incorporated herein by reference, none of these facts are genuinely in dispute or require jury resolution.

accommodation before taking the September 15, 2020 progression test. JA 536 ¶4; JA 50-55, Rabon Dep. 65:10-67:3, 81:16-82:16, 87:5-18, 107:5-19; JA 548, Rabon Dep. 107:5-19; JA 557-558, id. 327:9-328:11 (confirming he made no request for accommodation from Pepco until after he failed the progression test); JA 561.

Although Rabon failed his progression test on September 15, Pepco did not terminate his employment. JA 537 ¶¶5-6. Instead, at Rabon's request, Pepco offered him the opportunity to retake the progression test with accommodations, and scheduled the test for Friday, September 25. Id. ¶¶7-8. Rabon did not retake the progression test. Instead, he requested emergency floating holidays on September 24 and 25. Id. ¶9.[2] Pepco then rescheduled Rabon's retest for Monday September 28. JA 538 ¶10. But, again, instead of reporting to take the re-scheduled retest, Rabon called out "sick" for the first time, after which he never returned to work. Id. ¶11.

Rabon tested positive for Covid-19 on October 8 and was released from quarantine on October 22. JA 538 ¶12. Rabon was deemed eligible, or "certified", for short-term disability ("STD") benefits by Pepco's Occupational Health Services ("OHS") department on October 30 and received paid leave through

[2] Contrary to Rabon's unsupported claim, Brief at 3, Rabon did not call out "sick" on those days. JA 91-94, Rabon Dep. 297:20-298:8, 353:11-354:17, JA 235-236 (Text Messages).

December 20. Id. ¶¶13-14. Rabon regularly communicated with OHS during his absence, forwarding medical documentation as required. Id. ¶15.

On January 13, 2021, OHS informed Rabon that his medical documentation did not demonstrate that he was "disabled" under the STD policy and did not support his continued absence. JA 538 ¶16. After receiving additional medical documentation from Rabon's primary care physician, Dr. Mary Rifino, OHS again advised Rabon on January 25 that his medical records did not support continued STD. JA 539 ¶19. Pepco discussed with Rabon and Rifino having Rabon return to work part time initially, but Rabon declined, stating that he needed to stay out for six months. Id. ¶20; JA 242, JA 182-183, Forrester Dec. ¶¶15-16; JA 198-199, Thompson Dec. ¶7. As OHS had informed Rabon it would be, his leave was de-certified as of January 26. JA 539 ¶¶19, 21; JA 242; JA 198-199, Thompson Dec. ¶¶5-7. By that time, Rabon had been absent from Pepco's workplace for more than seventeen (17) weeks.

OHS's determination that Rabon's condition no longer justified continued STD leave was based on an assessment of the medical records Rabon provided. JA 540 ¶22[3]; JA 241-242; JA 261-262; JA 180-183, Forrester Dec. ¶¶5-6, 12-15, 17;

[3] Rabon purported to deny this fact but offered no evidence disputing that OHS based its assessment of whether his continued STD leave was justified on the medical records it received, offering instead only his own assessment of the medical records unsupported by any citations to the record. Accordingly, this fact should be deemed admitted.

JA 97-99, Forrester Dep. 31:3-33:10; JA 258 (doctor's notes of December 10 reflecting normal lung function); JA 269 (doctor's note of January 13 reflecting normal vitals, "no evidence of asthma/COPD," and "normal lung parenchyma"); JA 279, 283 (reflecting that the patient is exercising 5 to 7 times per week, walking more than one mile a day, exhibits normal vital signs, no evidence of asthma/COPD and normal lung parenchyma); JA 134-139, Rifino Dep. 52:11-57:1 (Rifino's notes from November 17 found nothing abnormal; he had normal pulse, normal blood pressure, and she had received reports of his normal chest x-ray and normal ejection fracture from the heart); JA 142-150, id. 73:16-74:4 (Rifino's notes from January 13 visit reflect Rabon was exercising 5 to 7 times per week walking more than a mile), 75:3-10 (January 13 exam reflected normal oxygen level, normal heart rate, and normal respiratory and cardiac systems), 76:8-17, 77:1-15, 79:1-22 (two week follow up suggested on January 13 was unrelated to any Covid symptoms), 82:15-18 (Rifino's January 27 notes reflected that Rabon was walking for two miles a day), 90:7-22 (Rifino's January 27 exam found that Rabon had normal temperature, normal pulse ox rate, and normal blood pressure), 93:2-4 (Rifino found nothing abnormal in her exam of Rabon on January 27).

Rabon misstates the record in an attempt to undermine Pepco's good faith assessment of those records. For instance, Rabon says that Angela Forrester, the OHS Nurse Case Manager assigned to his case, did not receive a degree in nursing

until 2022, Brief at 4, but Forrester testified in her deposition that she obtained her first degree in nursing, a degree permitting her to practice as a Registered Nurse, in 1993. JA 326, Forrester Dep. 7:9-8:7. Rabon also wrongly suggests that he had "significant fatigue [and] shortness of breath" on January 13, citing to a "medical note" of that date, Brief at 4, but it does not reflect what he claims. Rifino's medical records show that phrase appearing repeatedly (including November 17, December 1, and January 13) as part of the "History of Present Illness," which describes the initial onset of his illness in October. JA 263, 266, 268. Rifino testified that, when she examined Rabon on January 13, his respiratory and cardiac function were normal, and he reported walking more than a mile, five to seven days per week. JA 142-144, Rifino Dep. 73:24-74:5, 75:3-10. She made no medical judgment that day whether Rabon could return to work. Id. 75:11-14.

On January 29, Rabon submitted a note which, for the first time, claimed that he was not able to return to work. JA 541 ¶¶23-25.[4] That note was based only on Rabon's personal assessment of his own fitness to return to work, not any

[4] Although Rabon claimed to dispute Fact ¶23 – that he had not provided any medical documentation before January 26 directing that he remain out of work – he did not point to any evidence supporting that denial, and therefore has admitted that fact. Indeed, the record evidence makes plain that he received no such medical advice or direction after being released from quarantine. JA 277-286; JA 133-144, Rifino Dep. at 51:22-24 (did not advise Rabon to stay out of work on October 22), 62:6-12 (did not advise Rabon to stay out of work on November 17), 64:18-24 (did not advise Rabon to stay out of work on December 1), 75:11-20 (did not advise Rabon to stay out of work on January 13).

judgment by Rifino. Id. ¶25.[5] Rabon claims that Rifino made a "diagnosis" that he was unable to return to work as of January 27, Brief at 5, but that is also untrue. Rifino testified that (1) she found nothing abnormal in her examination of Rabon that day, (2) by that time he was walking two miles per day, and (3) that she reported to Pepco that he could not return to work at his request. JA 149-152, Rifino Dep. 90:7-22, 93:2-4, 93:5-24, 98:4-99:13; JA 562, Rifino Dep., 94:1-20. Indeed, Rifino testified that she would have cleared Rabon to work that same day had he requested it, making clear that she was simply reporting to Pepco what Rabon wanted her to say. JA 153, Rifino Dep. 101:10-16. Unsurprisingly, OHS found that note insufficient and, on February 2, enlisted Rifino's assistance to bring Rabon back to work. JA 541 ¶¶23-27.[6] Those efforts were unsuccessful.

Beginning on February 3, and several times thereafter, Rabon was warned that his continued absence without excuse amounted to job abandonment, warranting termination of his employment. JA 542 ¶28; JA 80-81, Rabon Dep.

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[5] Here, too, Rabon effectively admitted this fact because he objected only to its "relevance."

[6] Given Rifino's testimony that Rabon's physical exam was normal, plus her candor that she would have written a note for Rabon to go to work, it is not at all "bizarre," Brief at 5 n.7, that Forrester, after reviewing the medical records, disagreed with Rabon's conclusion, filtered through his willing mouthpiece, that he was physically unable to work. Indeed, Rabon had been warned that OHS would not accept a doctor's note lacking any medical justification. JA 181-183, Forrester Dec. ¶¶12, 13, 17, 18.

214:13-215:12. Pepco sent him letters on February 3 and February 9, both attaching the Job Abandonment policy, which states:

> When an employee fails to report to work without proper notification for three consecutive workdays, he or she is considered to have abandoned his or her job and to have voluntarily resigned from the Company.
>
> When an employee, fails to provide the required documentation to support the reason for the absence from work, including but not limited to the appropriate medical documentation, the employee is considered to have abandoned his job and to have voluntarily resigned from the Company.

JA 289-290[7]; JA 299 (February 3 letter); JA 300 (February 9 letter). Pepco reiterated these warnings to Rabon on February 12, during the Fact Finding meeting, and on February 15, in a follow up letter inviting Rabon to attend the Continued Employment meeting scheduled for February 19. JA 187-188; Gentry-May Dec. ¶¶16-20, 23; JA 302 (Fact Finding Summary); 304 (February 15 letter).

Despite these warnings, until the evening of February 18, Rabon maintained to Pepco that he could not return to work, repeatedly claiming he needed to be out for six months. JA 543-543 ¶29. Unbeknownst to Pepco, though, he reported something different to Rifino on Thursday, February 11 when he sought a note releasing him to return to work as of Monday, February 15, reporting that he

[7] The copy of the policy to which Rabon cites includes only the second of two pages, and neglects to include that portion making clear that the policy is violated after three consecutive days' absence.

"feels much better now." JA 543 ¶30; JA 301; JA 160-166, Rifino Dep. 115:1-118:16 (note written without examination or speaking to patient), 116:20-118:16 (note was based on patient request, not medical opinion), 123:2-12, 126:19-127:9; JA 169-171, Steen Dep. 31:15-33:13.

Despite feeling ready to return to work on February 11, Rabon did not report that to Pepco until a full week later. The night before the February 19 meeting where he would have his final chance to explain why he should not be terminated, Rabon first emailed to Pepco's Director of Human Resources, Marsha Byas (who had not previously been involved) the note purporting to "release" him to work four business days prior. JA 543 ¶¶30-31; JA 193, Byas Dec. ¶¶5-8. Rabon had not previously informed anyone at Pepco that he was willing or able to return to work. JA 543-544 ¶31; JA 74-77, Rabon Dep. 185:10-186:1, 191:16-192:6, 192:7-10; JA 101-102, Forrester Dep. 52:21-53:2 ; JA 306-307; JA 183, Forrester Dec. ¶19. Even in that call with Byas, Rabon did not report feeling better or explain that he had been released; he claimed he should not be required to return to work. JA 193-194, Byas Dec. ¶¶5-8. After Rabon sent her a note from his doctor, Byas forwarded it to OHS for review, without reviewing it herself, and OHS determined that the note contained no information justifying Rabon's continued absence after January 26, meaning his absences for that period remained noncertified. JA 545

¶33; JA 193-194, Byas Dec. ¶8.[8] By February 18, Rabon had been absent without medical justification for more than three weeks.[9]

Pepco's participants on the February 19 Continued Employment call (which did not include Byas) were not aware of Rabon's release note, and he did not tell them about it. JA 544-545 ¶32; see also JA 188-189, Gentry-May Dec. ¶¶25-27; JA 308-310; JA 176-177, Kargbo Dep., 72:10-73:7. Although Rabon claims that he told the participants at the February 19 meeting that he was ready to return to work, Brief at 8, such a claim is inconsistent with his prior statements made to the Court and under oath, and is properly disregarded. JA 554-556, Rabon Dep. 252:16-254:4 (testifying that he wrote his Original complaint, and it was true and correct); JA 559-560, id. 355:8-356:8 (testifying that he wrote his Charge of Discrimination and signed it under oath), JA 579-580 (Original Complaint) ¶¶29-

[8] The note Rabon sent on February 18 had been prepared by Rifino's office based solely on the requests of Rabon and his mother; she conducted no examination. JA 275; JA 301; JA 160-166, Rifino Dep. 115:1-118:15, 123:2-12, 126:19-127:9. Although the note states that Rabon had been "under her care" since October, that "care" included treatment for multiple minor ailments unrelated to Covid, such as an ear infection, reflux and back pain. JA 143-144, Rifino Dep. 74:24-75:1, 76:18-24, 79:9-14. Being "under her care" did not mean to Rifino that Rabon had been unable to work; she testified that she had never advised him to remain out of work. JA 133-153, Rifino Dep. 51:22-24, 62:6-12, 64:18-24, 75:11-20, 98:4-99:13, 101:10-16.

[9] Even by his own personal assessment of his fitness to return to work, he had been absent without medical justification for a full week.

30 (averring that on that second Pepco call, he told Gentry-May "I still have COVID symptoms, unable to breathe and was not cleared by my doctor to work"), JA 584 (Charge of Discrimination) (attesting, under oath, about the February 19, 2021 meeting: "Karen asks why I didn't return to work? I explained that I still have COVID symptoms, unable to breath and was not cleared by my doctor to return to work.") (emphasis added). Indeed, Rabon's own self-serving affidavit demonstrates that he was willing to tell different people different things about his condition to serve his own interests. He told Pepco on February 12 that he was "still sick" and "would [in the future] reach out to his physician to determine when he can return to work," JA 523-524 ¶¶27-28, but told Rifino on February 11 that he "felt much better now" and was ready to return to work. JA 301.

After the February 19 meeting, Pepco moved forward with the termination process, with the recommendation to terminate Rabon unanimously approved at a March 3 Consensus Call, and then finally approved at a March 15 Executive Termination call. JA 546 ¶¶34-37; JA 189, Gentry-May Dec. ¶¶29-34. Rabon was notified of his termination by letter dated March 16, 2021. JA 547 ¶38.[10]

[10] Rabon appears to believe it significant that the decision to terminate him was not finalized by February 19. Brief 8-9. There can be no doubt that the process for terminating Rabon's employment began on February 3 with the first Job Abandonment letter, and that Pepco followed a multistep process to investigate, recommend and finalize the termination which culminated with the March 16 letter. JA 187-189, Gentry-May Dec. ¶¶14-34; JA 299, 300, 304, 311-313. Rabon appears to believe that once he changed his mind and decided he could report to

Although Job Abandonment had been the catalyst for beginning the termination process, the fact that Rabon failed the CBA required progression test, and not returned to retake it once non-certified, was included because it was an independent reason supporting the termination. JA 546 ¶35; see also JA 297; JA 190-191, Gentry-May Dec. ¶¶38-40, JA 194, Byas Dec. ¶¶12. Had Rabon timely returned to work, Pepco would have allowed him to retake the progression test. JA 547 ¶40.[11]

Pepco was not motivated to terminate Rabon because he had or claimed to have a learning disability, because he sought any accommodation, because he had been diagnosed with Covid in October 2020 or because he had taken leave while quarantined. JA 547 ¶39[12]; see also JA 190, Gentry May Dec. ¶¶35-37, JA 194-195, Byas Dec. ¶¶11-18. As of March 2, 2021, 135 Pepco employees had taken leave for Covid: all but six had been successfully returned to work, one had retired while on leave, four remained on STD, and only Rabon had been non-certified for STD and failed to return to work. JA 195, Byas Dec. ¶16.

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work, Pepco was legally required to excuse his being AWOL for three weeks. Neither the DCHRA nor the CSEA impose any such requirement.

[11] Rabon has not cited to a single piece of evidence to contradict this fact, meaning it should be deemed admitted. See also JA 179, Kargbo Dep. 90:7-12, JA 190-191, Gentry-May Dec. ¶40; JA 195-196, Byas Dec. ¶¶13, 18

[12] Here, too, Rabon identified no contrary evidence, thereby admitting the fact.

STATEMENT OF STANDARD OF REVIEW

This Court reviews grants of summary judgment *de novo,* "applying the same standard the trial court was required to apply when considering a motion for summary judgment." Hsieh v. Formosan Ass'n for Pub. Affairs, 316 A.3d 448, 453 (D.C. 2024). Thus, this Court, like the Superior Court, "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Id., citing Sup. Ct. Civ. R. 56(a)(1). "[T]o avoid summary judgment, there must be some 'significant probative evidence tending to support the complaint' so that a reasonable fact-finder could return a verdict for the non-moving party." Lowrey v. Glassman, 908 A.2d 30, 36 (D.C. 2006) (internal citations omitted). Conclusory assertions by the plaintiff are insufficient; rather, the "emphasis is on the need for evidence." Hamilton v. Howard Univ., 960 A.2d 308, 313-314 (D.C. 2008). "As courts are not free to second-guess an employer's business judgments, a plaintiff's mere speculations are insufficient to create a genuine issue of fact . . .". Id. at 314 (internal quotations omitted).

SUMMARY OF ARGUMENT

Rabon was terminated from his Pepco employment only after he refused to return to work at the conclusion of his approved leave. He cannot recover for disability discrimination because he did not have a disability under the DCHRA,

was not qualified for his position, and was not terminated because of any medical condition. He cannot recover for retaliation under the DCHRA because he cannot show that Pepco was motivated to terminate his employment because he requested any reasonable accommodation under the DCHRA, or for any other protected activity. The evidence demonstrates that Pepco was not so motivated; it honored Rabon's requests for test-taking accommodations and provided him more leave than legally required. Pepco's enforcement of its Job Abandonment policy in the face of Rabon's refusal to return from leave once it was no longer medical justified does not amount to retaliation for taking any such leave. Rabon's CSEA retaliation claims fails, like his DCHRA retaliation claim, because there is no evidence that Pepco terminated him for the leave he took during his quarantine period.

ARGUMENT

I. Summary Judgment Was Proper on Rabon's Discrimination Claim

Summary judgment was properly granted in Pepco's favor on Rabon's disability discrimination claim (Count I) because he cannot make out a *prima facie* case and because he cannot disprove Pepco's legitimate non-discriminatory reason.

A. Rabon Cannot Make Out a *Prima Facie* Case of Discrimination.

To make out a *prima facie* disability discrimination claim, Rabon must prove that he (1) had a DCHRA-covered disability, (2) was qualified for his

position, and (3) suffered an adverse employment action based on his disability. Lytes v. D.C. Sewer & Water Auth., 527 F. Supp. 2d 52, 60 (D.D.C. 2007).[13] Here, Rabon cannot prove any of those elements.

1. *Rabon Cannot Prove That He Was Disabled Under the DCHRA.*

Rabon is obligated to come forward with sufficient evidence from which a reasonable jury could find that he is or was disabled within the meaning of the DCHRA. Chang v. Institute for Public-Private P'ships, 846 A.2d 318, 324 (D.C. 2004); see also Brett v. Brennan, 404 F. Supp. 3d 52, 61 (D.D.C. 2019) ("Consider the alternative. A plaintiff could maintain a disability discrimination case without a showing of any kind that he is disabled. Surely this is not the law.") Because Rabon came forward with no evidence that either of the two conditions he identified in his Complaint, JA 221 ¶56, constituted a DCHRA-covered disability, summary judgment was proper on this basis alone.

The DCHRA defines disability as a "physical or mental impairment that substantially limits one or more major life activities." D.C. Code §2-1401.02 (5A). "A disability substantially limits a major life activity if it significantly restricts the

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[13] Pepco agrees with Rabon that disability claims brought pursuant to the DCHRA are frequently analyzed under the same standard as ADA claims. Brief at 12, citing Hunt v. District of Columbia, 66 A.3d 987, 990 (D.C. 2013); see also Elzeneiny v. Dist. of Columbia, 125 F. Supp. 3d 18, 37 (D.D.C. 2015). Rabon is wrong to suggest, though, that the court in Hunt looked to the ADA to "interpret an employee's disability status under the DCHRA." Brief at 12. The Hunt court did not analyze the plaintiff's disability status *at all* under the DCHRA or the ADA.

condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." District of Columbia v. Delwin Realty, LLC, 2022 D.C. Super. LEXIS 44, *20-21 (May 31, 2022), citing Ivey v. District of Columbia, 949 A.2d 607, 612-613 (D.C. 2008) (internal citation omitted). Rabon must prove as a threshold matter that he has an impairment fitting that definition to proceed under the statute. Rabon disagrees, suggesting that the Court conduct *no* analysis of whether he has a disability, Brief at 12-13, 17-18, arguing essentially that because the ADA has been amended to have "broad coverage," courts should never evaluate whether a DCHRA plaintiff actually has a covered disability. Rabon fundamentally misconstrues the law. Courts routinely make such assessments even under the ADA, dismissing cases where a substantially limiting ailment is not sufficiently alleged. See, e.g., Massaquoi v. District of Columbia, 81 F. Supp. 3d 44, 54-55 (D.D.C. 2015) (dismissing ADA claim because plaintiff failed to allege his condition substantially limited any major life activity); Scott v. Dist. Hosp. Partners, L.P., 60 F. Supp. 3d 156, 164 (D.D.C. 2014) (dismissing ADA claim where there was no allegation that plaintiff had an impairment that "substantially limited a major life activity as compared to the general public") (emphasis in original); see also Carter v. Carson, 241 F. Supp. 3d 191, 196-197 (D.D.C. 2017)

(dismissing Rehabilitation Act claim for failure to allege facts sufficient to show substantial limitation). Just as complaints are subject to dismissal for failing to *allege* a substantially limiting impairment, it is undoubtedly proper to assess here whether Rabon has evidence of any such impairment. Even the EEOC regulations Rabon cites explain that, to constitute a covered disability under the amended ADA, an impairment must "substantially limit[] the ability of an individual . . . as compared to most people in the general population." 29 C.F.R. §1630.2(i)(1)(ii).

The Court need not consider whether Rabon's claimed learning disability amounts to a DCHRA-covered disability because, by omitting it from his discussion of the issue, he has abandoned any such claim. See Brief at 12-32; Rose v. United States, 629 A.2d 526, 536 (D.C. 1993) ("It is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived.") Such an argument would be unsuccessful in any event. Rabon has put forward no medical evidence whatsoever relating to any learning disability, testifying only that he was diagnosed with some unspecified learning disability in or about 1998 (when he was a child) during a single visit with an unnamed doctor, without any follow up. JA 40-43, Rabon Dep. 15:15-18:2. Rabon described his condition as "difficulty with focusing," affecting his reading and writing but could not describe how he differed from the general population in those abilities. JA 87-89, Rabon Dep. 226:20-228:4. Rabon's only "evidence" of his alleged learning disability is a

collection of documents dating from 2007. JA 354-363. Those unauthenticated documents are hearsay and inadmissible for the truth of the matters asserted therein, but even if they were competent evidence, they do *not* establish that he suffered from *any* condition at the time of the challenged employment decision. Lytes v. D.C. Water & Sewer Auth., 527 F. Supp. 2d 52, 61 (D.D.C. 2007) ("[I]t is not relevant that [plaintiff] was once truly disabled. He did not qualify as disabled . . . when he was discharged."); see also Jennings v. Watson, 11 F.4th 335, 344 (5th Cir. 2023) ("In an ADA case, the relevant time for assessing the existence of a disability is the time of the adverse employment action.")

Rabon's Covid-19 disability claim fares no better because he has also failed to point to any evidence that his bout of Covid constituted a disability within the meaning of the DCHRA. Rabon's medical records reflect no significant, non-transient physical abnormalities resulting from his Covid condition. JA 538-541, ¶¶16, 19, 22, 24-26. For example, the examination notes consistently indicate that he had normal vital signs, lung function, and cardiovascular function, and reflect that Rabon was walking two miles a day by January 2021. JA 540 ¶22; JA 271-272. Nor has Rabon identified any major life activity in which he has been substantially limited by Covid. Although Rabon complained of ongoing respiratory issues, he provided no evidence of how his breathing compared with the general public, JA 89-90, Rabon Dep. 228:10-229:1, and thus cannot show he

is substantially limited in breathing. Rabon may contend that he was substantially limited in the major life activity of working because, according to him, he could not work between October 8 and February 15. But Rabon's personal assessment that he was not well enough to work is the quintessential "conclusory assertion" that cannot be relied upon to establish a necessary factual element of his claim. No medical provider advised him to remain out of work after October 22, meaning that there is no competent evidence supporting any claim that he was substantially limited in his ability to work during that time period. JA 541 ¶¶23-26; JA 133-153, Rifino Dep. 51:22-24, 62:6-12, 64:18-24, 75:11-20, 98:4-99:13, 101:10-16.

Rabon argues repeatedly that deciding whether he has proven a DCHRA covered disability should not involve "extensive analysis," Brief at 13, 18, but it does not follow that courts must avoid undertaking *any* analysis. Indeed, Rabon's own citations prove that analysis of the specific facts of a plaintiff's condition can make a difference between being covered or not covered by the disability laws. For instance, in Martin v. District of Columbia, 78 F. Supp. 3d 279 (D.D.C. 2015), the court thought it proper to consider the fact that the plaintiff's doctor had given specific examples of essential functions plaintiff was unable to perform for particular time periods in evaluating the plaintiff's disability. There is no similar evidence here of Rabon's doctor's opining that any of his symptoms precluded him from performing his position at any time after October 22.

Rabon cites to three cases for the proposition that "Covid is a disability" unless temporary or transitory. Brief at 14 (emphasis in original). None of the cases make any such a holding; all are factually and/or legally inapposite. In Brown v. Roanoke Rehab. & Healthcare Ctr., 586 F. Supp. 3d 1171 (M.D. Ala. 2022), the court permitted plaintiff's ADA claim to proceed where she was fired during her Covid isolation period and while she still suffered significant symptoms including "severe weakness, fatigue, brain fog, high blood pressure, cough, difficulty breathing, fever, and swollen eyes," all allegedly caused by Covid. 586 F. Supp. 3d at 1174-75, 1177. Far from claiming that Covid will always be a disability, unless temporary or transitory, the Brown court described the analysis of whether Covid constitutes a disability under the ADA as a "fact driven inquiry that is not appropriate for resolution at this [motion to dismiss] stage." Id. at 1179 n.1. See also Mattias v. Terrapin House, Inc., Case No. 5-21-02288, 2021 U.S. Dist. LEXIS 176094, *9-12, 2021 WL 4206759 (E.D. Pa. Sept. 16, 2021) (denying a motion to dismiss on an ADA claim where plaintiff was terminated the day she informed her employer of her Covid diagnosis); Sharikov v. Philips Med. Sys. MR, Inc., 659 F. Supp.3d 264, 281 (N.D.N.Y. 2023) (dismissing ADA claim alleging that employer regarded employee as having an impairment by virtue of his unvaccinated status).

The EEOC guidance Rabon cites also undermines his categorial approach, stating that the evaluation of whether Covid amounts to a disability will require "[a]n individualized assessment . . . to determine whether the effects of a person's [Covid] substantially limit a major life activity." What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, (May 15, 2023), at 68. Indeed, the EEOC says there will "always" need to be a "a case-by-case determination that applies existing legal standards to the facts of a particular individual's circumstances." Id. Rabon asks this Court to avoid undertaking the EEOC prescribed analysis.

Rabon points to only three pieces of evidence to show that he is or was disabled under the DCHRA: (1) an email from Angela Forrester dated December 23, 2020, (2) a note from January 13, 2021 that includes a reference to "post-viral fatigue syndrome" and (3) a note from January 27, 2021. The email from Forrester confirms nothing more than the fact that Pepco believed on December 23 that Rabon was entitled to STD; Forrester was not opining on Rabon's coverage under the DCHRA. JA 180-181; Forrester Dec. ¶¶4-7. The note on January 13 provides no substantive information about Rabon's condition on that day; one cannot tell from the use of the term "post-viral fatigue syndrome" whether Rabon's symptoms are minor or severe, substantially limiting or merely annoying. Finally, Rabon points to the notes from Rifino dated January 27, his last physical exam in the

relevant time period. Rifino's notes do not support a finding that he was substantially limited as of that day. By then, Rabon was walking two miles a day, and Rifino found nothing abnormal in her examination. JA 148-150, Rifino Dep. 82:15-18, 90:11-22, 93:2-4; JA 562, id. 94:16-20. Rifino's note that Rabon should not return to work does not prove any substantial limitation; it was based entirely on Rabon's subjective report that he believed prevented him from returning to work. JA 151-152, Rifino Dep. 98:4-99:13. She would have written him a note to return had he requested it. JA 153, 101:10-16. Indeed, before Rabon was first sent a Job Abandonment letter, Rifino had told Pepco there was no medical reason Rabon could not return to work. JA 98-99, Forrester Dep. 32:1-33:10; JA 183, Forrester Dec. ¶18; JA 199, Thompson Dec. ¶9; JA 563-568, Rifino Dep. 106:6-108:10, 108:24-112:6. Given these facts, Plaintiff has not demonstrated that he was substantially limited by Covid on or after January 26.

In perhaps his most egregious exaggeration in the Brief, Rabon claims that "the EEOC has deemed Rabon a disabled person." Brief at 17. Of course that did not happen. Rabon may believe that his symptoms, at some point in time, may have fallen within the examples given by the EEOC regarding Covid, but the medical evidence provided by Rabon has not supported that claim. Nor is it fair to say that the lower court excluded from DCHRA coverage individuals with "pre-existing conditions," as Rabon suggests. Brief at 17. Rather, the opinion was

pointing out the Rabon had offered no evidence that the few lingering symptoms reflected in the record -- dyspnea and mild aortic dilation – were related to his Covid diagnosis, as opposed to his years as a habitual smoker or his obesity. Order at 15. Importantly, though, the court did not rely alone on that finding, concluding further that Rabon had not offered any evidence that he had any lingering damage or symptoms "that made major life activities any more difficult for him than a normal person," and for that reason, he failed to demonstrate that he suffered from a covered disability. Id. 15-16. Because Rabon's Brief here confirms that he has no evidence that he was substantially limited in any major life activity as compared to an average person in the general population, the lower court's ruling in that regard is properly affirmed.[14]

2. *Rabon Cannot Prove That He Was Qualified for His Position.*

To state a *prima facie* case, Rabon must also show that he was qualified for the position that he sought or held. Badwal v. Bd. of Trustees, 139 F. Supp. 3d 295, 310 (D.D.C. 2015). "The term 'qualified,' with respect to an individual with

[14] To the extent that Rabon suggests his claim should survive because he was "perceived as" being disabled, but he cannot prove that either. Pepco was trying to return him to work in January and February 2021 because it believed him to be able to work, not disabled. JA 538-539, 541-542 ¶¶17, 20, 26-28. By contrast, it was Rabon who protested that he was not well enough to return, repeatedly claiming that his Covid symptoms "could" take up to six months to resolve. JA 542-543 ¶29. Rabon may have perceived himself to be disabled, but he cannot establish that any Pepco decisionmaker believed it to be so.

a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires . . . ." 29 CFR §1630.2(m). One of the "other job requirements" for the Helper position was passing the progression on the first try. JA 208, JA 211. Because Rabon failed the test, he was not "qualified," as the lower court correctly concluded. Order at 16-17.

Rabon admits that passing the progression test was a job requirement, he failed the test, and, by contract, his employment should have been terminated as a result. JA 536-537 ¶¶3, 5-6. Contending that he was nevertheless "qualified," Rabon asks this Court to assume that (1) he was disabled under the DCHRA as of September 15, entitling him to accommodation and (2) with such accommodation, he would have passed the test. Brief at 20. Because Plaintiff's arguments are based on nothing more than speculation, they are properly rejected. Being unqualified dooms Rabon's claim.

Rabon's only rejoinder to the conclusion that he was not qualified for his position is to protest that he should not have been charged with rescheduling his own re-test since he was out of work. Brief at 20-22. Rabon's absence after January 26 was entirely of his own doing. By February 18 when he first claimed he could return to work, he had already been absent without justification for more than three weeks, and the process to terminate him had already begun. By contrast,

had Rabon *timely* returned to work once his leave was de-certified, the evidence is undisputed that he would have been permitted to re-take the test with his requested accommodations. JA 547 ¶40; JA 179, Kargbo Dep. 90:7-12; JA 190-191, Gentry-May Dec. ¶40; JA 195-196, Byas Dec. ¶¶13, 18.

Rabon claims that it would be unfair – and even illegal – to consider his failed test since he needed an accommodation but there are several problems with that argument. Rabon did not request any accommodation until *after* failing the test. JA 536-537 ¶¶4, 7. Pepco is not obligated to ignore the CBA's requirements because he belatedly requested a do-over. Second, Rabon has not even attempted to establish that he had a learning disability entitling him to any testing accommodation. See Part I.A.1 *supra.* Third, Pepco offered him the opportunity to retake the test, but Rabon rejected that offer when he did not report to work for the scheduled retest or return to work in a timely manner. JA 537-538, 542-543 ¶¶9-11, 29. Accordingly, the failed test is properly considered to find that Rabon was not qualified for his position.

But, there is a more fundamental problem, overlooked by Rabon and undecided by the lower court. Rabon has never established an entitlement to any accommodation under the DCHRA as a result of any learning disability. He has offered no medical documentation of any limitation, and the only document he attached to his summary judgment opposition on this issue, was inadmissible and

provided no basis for finding that he had, as of September 2020, any substantial limitation in any major life activity. Because Rabon has not established any legal entitlement to a reasonable accommodation on his September 15 progression test, his failure should have resulted in his immediate termination. Accordingly, whether or not Pepco thought it *should* offer Rabon a re-test with additional time, the fact remains that, by failing the original test, Rabon was contractually unqualified to remain in his position.[15]

3. *Rabon Cannot Prove That Any Disability Motivated His Termination.*

Rabon has adduced no evidence that anyone at Pepco was motivated to terminate him either because he allegedly suffered from a learning disability or because he had previously been diagnosed with Covid. Indeed, by his silence, he admits there is none. JA 547 ¶39. By contrast, the testimony and documentary evidence is overwhelming that Rabon was recommended for termination only after he refused to return to work after being notified that his continued absence was not

[15] Rabon also argues that Pepco's inclusion of his failed test as a separate justification for his termination independently amounts to discrimination, but that does not address the question of whether Rabon was "qualified" for the position. Brief at 21-23. But it also makes no sense. There is no reason to think that Pepco considered Rabon's failed test *because* he requested to retake it or *because* he claimed to have a disability. The testimony of Marsha Byas, to which Rabon cites, Brief at 23, is no way admits that Pepco unlawfully considered Rabon's disability or request for accommodation in making the decision to terminate his employment. She testified to the contrary. JA 194-196; Byas Dec. ¶¶11-18.

approved. JA 539-543 ¶¶19-29. Rabon himself testified that he did not know why he was terminated. JA 84, Rabon Dep. 221:16-21. Lacking any evidence from which to infer discrimination, Rabon has not satisfied his prima facie case.

B. Pepco Had Legitimate Non-Discriminatory Reasons for Its Termination Decision.

Even if Rabon had made out a *prima facie* case, Pepco has adduced ample evidence of its legitimate non-discriminatory reasons for terminating Rabon's employment – he did not return to work as directed after being told his leave was no longer medically justified and he had not passed the progression test required for his position. Pepco's burden at this stage is minimal. It need only "articulate" its non-discriminatory reason; it need not prove them, though it has. Johnson v. District of Columbia, 225 A.3d 1269, 1280 (D.C. 2020); Cain v. Reinoso, 43 A.3d 302 (D.C. 2012) (describing employer's burden as one of "production, not persuasion") (internal quotation omitted).

1. *Pepco Ended Rabon's Employment Because He Abandoned His Job.*

Pepco's Job Abandonment policy provides that an employee is considered to have resigned from his employment if he remains out of work for three consecutive days without excuse including, as is relevant here, adequate documentation of the need for medical leave. JA 289-290. Here, Rabon's termination was initiated because he remained out of work for more than three days after his absence was decertified on January 26. JA 539, 542 ¶¶21, 28. Rabon concedes that he was

warned that his continued absence violated the Job Abandonment policy. JA 80-83, Rabon Dep. 214:13-216:6, 218:1-5; JA 522 ¶¶21, 23, 27. Thus, Pepco has enunciated a legitimate non-discriminatory reason for his termination. See Nurriddin v. Bolden, 40 F. Supp. 3d 104, 130 (D.D.C. 2014) (failure to provide adequate medical documentation for extended leave was legitimate non-discriminatory reason for designating employee as AWOL); id. at 132 ("Failure to comply with an employer's attendance policy constitutes a nonretaliatory and nondiscriminatory ground for an adverse employment decision.").

2. *Pepco Also Considered Rabon's Failed Progression Test.*

Although it was not the reason for initiating Rabon's termination, Pepco also considered the fact that Rabon had failed the progression test required to perform his position. JA 546 ¶35. The CBA makes clear that "failure to pass the test on the first attempt . . . shall lead to automatic termination of employment." JA 208, 211. Failing a required test or training constitutes a legitimate non-discriminatory reason for employment actions. Bucknell v. Refined Sugars, Inc., 82 F. Supp. 2d 151, 156-157 (S.D.N.Y. 2000) (holding that employee's failed training, which by rule would have precluded any future promotion, and failed oral test were legitimate non-discriminatory reasons for failure to promote, even where employer had previously agreed to overlook the failed training); see also Hudgens v. Owens-Brockway Glass Container, No. W-93-CA-123, 1994 U.S. Dist. LEXIS 21411, at

*8-9 (W.D. Tex. Jan. 31, 1994) (finding legitimate non-discriminatory reason where plaintiff had failed a test required for promotion).

C. Rabon Has No Evidence That Pepco's Reasons Are Mere Pretext.

Because Pepco has satisfied its burden of articulating a legitimate non-discriminatory reason for his termination, Rabon can survive summary judgment only if he can prove both that (1) Pepco's stated reason was false, *and* (2) the decision was motivated by discrimination. Hollins v. Fannie Mae, 760 A.2d 563, 571 (D.C. 2000). Rabon has proven neither.

To begin, there is no evidence that Pepco's stated reasons were not its real reasons. Rabon cannot now make any such claim because he has admitted that he does not know the reasons he was terminated. JA 84, Rabon Dep. 221:16-21. Instead, the undisputed evidence proves Pepco initiated proceedings on February 3 shortly after Rabon had failed to return to work for more than three days after his absence was decertified, thereby implicating the Job Abandonment policy. JA 539, 542, 546 ¶¶21, 28, 35; JA 299; JA 198, Gentry-May Dec. ¶¶14-17. Rabon's testimony confirms that Pepco repeatedly identified the Job Abandonment policy during their discussions regarding his continued employment. JA 83, Rabon Dep. 216:2-6; JA 299-304, 308-313. It is likewise clear that Pepco's OHS department had communicated to HR that Rabon's leave was no longer medically justified, such that his continued absences were not excused, JA 287-288, 291-292, and had

communicated the same to Rifino. JA 154-159, Rifino Dep. 108:7-109:23, 111:8-112:6, 113:22-114:13.

Rabon also has no basis to dispute that Pepco believed Rabon's failure on the progression test to be a legitimate consideration in his termination. JA 546 ¶35; JA 208, 211. Indeed, Pepco had imposed the same consequences – termination – on three other employees in the Underground department who had failed the progression test or abandoned their job during the same time period, none of whom had claimed to have a learning disability or Covid, JA 191, Gentry-May Dec. ¶41, undermining any suggestion that Pepco's reasons were pretextual.

Rabon has claimed that Pepco was mistaken when it decided to decertify his disability as of January 26, contending as he did at the time that he was not yet well enough to return to work, but Rabon's opinion does not help him establish pretext. Just as a plaintiff's opinions regarding his own qualifications or job performance are irrelevant in employment discrimination claims; here, Rabon's subjective opinion about his readiness to return to work is likewise irrelevant. Instead, "[i]t is the perception of the decisionmaker which is relevant." See Ajisefinni v. KPMG, LLP, 17 F. Supp. 3d 28, 41 (D.D.C. 2014) (citation omitted); Waterhouse v. Dist. of Columbia, 124 F. Supp. 2d 1, 7 (D.D.C. 2000). Notably, Rabon has not offered any medical evidence that Pepco's assessment was incorrect, nor could he because his doctor confirmed that she never advised him to

remain out of work after quarantine, and in fact had discussed with him returning to work on February 2. JA 241-242 ¶¶23-25, 27; JA 133-160, Rifino Dep. 51:22-24, 62:6-12, 64:18-24, 75:11-20, 98:4-99:13, 101:10-6, 108:7-109:23, 118:8-112:6, 113:22-114:13; JA 291.

But even if Rabon could point to something suggesting that he was right to refuse to return to work, that would not salvage his claim because even an incorrect or mistaken assessment that Rabon's leave was no longer justified, so long as it was honestly held, would be insufficient to demonstrate pretext. See, e.g., Kumar v. D.C. Water & Sewer Auth., 25 A.3d 9, 19 (D.C. 2011) (plaintiff could not prove pretext because he could not establish that employer "could not reasonably believe" its own explanation "such that their proffered reason would seem 'phony'"); Dyer v. McCormick and Schmick's Seafood Rests., Inc., 264 F. Supp. 3d 208, 226-29 (D.D.C. 2017) (finding no pretext when managers reasonably believed that employee was not qualified for position, notwithstanding plaintiff's differing assessment). Rabon has offered no evidence that OHS did not honestly believe that his leave was no longer medically justified. Rabon might argue it was harsh to force him back to work before he wanted to return, but "[i]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. He must show that the explanation given is a phony reason." Fischbach v. Dist. of Columbia Dep't of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996)

(citations omitted). Without evidence that Pepco's stated reasons were phony, Rabon cannot show pretext.

Any effort by Rabon to demonstrate pretext would fail for the independent reason that he cannot show that any disability-based discrimination motivated his termination. Rabon's must demonstrate that there is evidence from which a jury could find that a DCHRA-covered disability was "a substantial factor" in his termination. Rose v. United Gen. Contrs., 285 A.2d 186, 197 (D.C. 2022). "A 'substantial factor' means that the protected characteristic was a significant motivating factor bringing about the employer's decision." Id. (internal citation omitted); see also Arthur Young & Co. v. Sutherland, 631 A.3d 354, 361 (D.C. 1993) (requiring in a *prima facie* case "that a substantial factor in that [employment decision] was the plaintiff's membership in the protected class").[16] Rabon has not identified any evidence to suggest that anyone at Pepco had any animus toward him because of his alleged learning disability. Rather, the record

[16] Rabon's citation to Muldrow v. City of St. Louis, 144 S.Ct. 967, 974 (2024), Brief at 31, n.21, misrepresents the Court's discussion and is completely inapposite. Muldrow addressed the question of what harm is sufficient to make out an adverse employment action; it did not address the question of when an impermissible motive constitutes a "substantial factor" in any decision. See Dzibela v. Blackrock, Inc., Civ. A. No. 23-02093, 2024 U.S. Dist. LEXIS 176895, *36 n. 9, 2024 WL 4349813 (D.N.J. Sep. 30, 2024) (" . . . Muldrow lowered the bar for what constituted an adverse employment action, not the requisite level of discriminatory animus.") (internal citation omitted). Indeed, contrary to Rabon's parenthetical, the phrase "substantial factor" appears nowhere in the opinion.

reflects that when he asked for a testing accommodation because of what he described as a learning disability, Pepco agreed to his request. JA 537, 547 ¶¶7, 40.[17] Similarly, there is no evidence to suggest that anyone was motivated to terminate him because of his Covid diagnosis. Pepco tried to bring him back to work after OHS deemed him well enough to return, JA 538-539, 542 ¶¶17, 20, 27, 28, which would be the exact opposite of what one would expect if Pepco intended to fire him because of his Covid diagnosis.[18] Indeed, Rabon has conceded by his silence that he had no such evidence. JA 547 ¶39.

Rabon makes two responsive arguments, neither meritorious. First, he argues that it was inherently discriminatory for Pepco to rely on his failed progression test after having offered a retest. Brief at 27. This argument makes no sense. There is no reason to think that Pepco considered Rabon's failed test *because* he requested to retake it or *because* he claimed to have a learning disability. Pepco had agreed to permit Rabon to retake the test in September and had rescheduled his retest when he called out on emergency floating (not sick)

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[17] Rabon had been granted accommodation by a different Exelon entity on his pre-employment tests, JA 45-49, Rabon Dep. 47:13-51:5; JA 229-230, but did not notify anyone in the Helper training program that he needed accommodation until after failing the progression test. JA 536 ¶4.

[18] By March 2, 2021, Pepco had successfully returned to work 129 of 135 employees who had been diagnosed with Covid-19, undermining any suggestion of discriminatory bias against individuals with Covid. JA 195, Byas Dec. ¶16. Four remained on STD, one retired while out, leaving only Rabon. Id.

leave. JA 537-538 ¶¶7-11. It took no further steps to address Rabon's failed test until he had been absent from work for more than two weeks without excuse. Had Rabon returned to work when he was directed to do so, Pepco would have allowed him to retake the progression test with his requested accommodation. JA 547 ¶40; JA 179, Kargbo Dep. 90:7-12; JA 190-191, Gentry-May Dec. ¶40; JA 195-196, Byas Dec. ¶¶13, 18. Notably, Rabon points to no evidence suggesting any unlawful motive.[19] Rather, the undisputed evidence is that Pepco included the failed test in its decision because it was an independent, contract-based reason for the termination. JA 546 ¶35.[20]

Rabon's repeated citation to Rose v. United General Contractors, 285 A.2d 186 (D.C. 2022) does not help him prove any discriminatory motive here. In that

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[19] The suggestion that Byas *admitted* that Pepco discriminated against Rabon – under the ADA – in her deposition testimony is so preposterous, it smacks of desperation. Brief at 27. First, Rabon has not sued Pepco under the ADA, but there is no such "admission" in any event. In the cited passage, Rabon's counsel asked Byas a hypothetical question, which she answered appropriately. The question and answer said nothing about Pepco's decision here. In fact, Byas testified that there was no unlawful discrimination here. JA 195-196, Byas Dec. ¶¶13-18.

[20] Rabon's argument that Pepco's termination decision discriminated against him on the basis of his learning disability is inherently flawed since he has waived any claim that his alleged learning disability constitutes a DCHRA-covered disability. Even if he had not waived that argument by his silence, he has not proven any such disability. See Part I.A.1, *supra*. The only document he points to regarding his alleged disability, Brief at 26, citing JA 354, is unauthenticated hearsay and inadmissible.

case, the employer was concerned that its employee, who suffered from Parkinson's disease, was not able to fulfill his job duties and terminated him for poor performance, while alternatively describing it as a position elimination. 285 A.2d at 190, 195-196. The employer required a "fitness for duty" from the plaintiff which, having been returned with work restrictions, appears to have prompted the plaintiff's firing the very next day. Id. at 190. And, when asked to describe its reasons for termination, the employer included the plaintiff's "not providing us information about his ability to continue working," and "his health report." Id. at 197. In other words, the facts are not only inapposite, they are the complete opposite of what happened here. Instead of requiring Rabon to provide a fitness for duty before he could return to work, Pepco told Rabon to come back to work based on his medical records and he refused. Instead of being concerned that Rabon could not perform his job because of any health condition, Pepco thought he could come back to work and directed him to do so. And, instead of terminating an employee because of concerns about his "health report," Pepco terminated Rabon after he refused to return to work despite his "good health" report, which it believed (and was confirmed by Rifino) indicated that he could return to work.

Rabon also argues that he did not violate Pepco's Job Abandonment policy because he provided what he deemed to be "appropriate medical documentation." Brief at 29. Rabon focuses on the requirement to provide "appropriate medical

documentation," but overlooks the equally- or more- important requirement that the documentation "support the reason for the absence from work." JA 289-290. Merely providing *some* medical documentation is not sufficient; to avoid violating the policy, the documentation provided must justify the absence.[21] Rabon's documentation did not support his continued absence after January 26, JA 538-542 ¶¶21-29, and Rabon has offered nothing to prove otherwise.

Of the few documents he points to, Brief at 29, only two refer in any way to the time period after January 26, and neither constitutes "documentation to support the reason" for his continued absence from work. First, Rifino's office notes from January 27 do not support his ongoing absence from work because, among other things, his physical examination was entirely normal, he was walking two miles per day, and the notation that "pt not able to work at this time" was based entirely on Rabon's request, not a medical assessment. JA 540-541 ¶¶22-25; JA 148-153, Rifino Dep. 82:15-18, 90:7-22, 93:2-4, 98:4-99:13, 101:10-16. OHS made clear

[21] Just as he did with Byas's testimony, Rabon mischaracterizes the testimony of Karen Gentry-May, Pepco's Human Resources Business Partner to suggest that she "called baloney" on Pepco's decertification decision. Brief at 29-30. She did no such thing. In the full exchange, Rabon's counsel asked her whether she would "agree with me that Mr. Rabon provided medical documentation to Pepco?" to which she answered "Okay. He provided documentation. I'm not sure if I can be the one to say – I mean, it didn't come to me so I can't really say exactly what he provided or what it was." JA 516; Gentry-May Dep. 64:1-12. She went on to testify that she had never seen any of the medical documentation provided. Id. at 19; see also Ex. 3, Gentry-May Dep. 53:3-55:8.

to Rabon and Rifino that it did not find the January 26 note to be sufficient justification for any continued absence. JA 541-542 ¶26. Second, Rifino's February 11 note releasing him to work on February 15 provided no justification for his continued absence after January 26, and was again based on the patient's request instead of any medical assessment. JA 543 ¶30. Here, too, OHS found this work release insufficient to excuse his absences after January 26 as it provided no information regarding Rabon's condition during that time period that justified his absence. JA 545 ¶33; see also JA 101, Forrester Dep. 52:17-20; JA 199-200, Thompson Dec. ¶¶10-14; JA 194, Byas Dec. ¶10. Even if we were to assume, *arguendo*, that Rifino's bare bones note should have been sufficient to excuse Rabon's refusal to return to work between January 26 and February 11, he violated the policy Job Abandonment policy again after its receipt because he did not notify Pepco that he could return to work until four business days had passed.

II. Summary Judgment Was Proper on Rabon's Retaliation Claim

Summary judgment is also appropriate on Rabon's claim (Count II) that Pepco retaliated against him when it terminated him. Rabon cannot satisfy his *prima facie* case and cannot show that Pepco's stated reasons were a mere pretext to disguise a retaliatory motive.

A. Rabon Has No Evidence To Support His *Prima Facie* Case.

To make out a *prima facie* case of retaliation claim under the DCHRA, a plaintiff must demonstrate that (1) he engaged in a protected activity, (2) he was subjected to an adverse employment action, and (3) there was a causal link between the protected activity and the adverse action. Arthur Young & Co. v. Sutherland, 631 A.2d 354, 368 (D.C. 1993). Rabon's retaliation claim fails because he cannot establish that his termination was substantially motivated by any protected activity.

1. *Rabon Last Engaged In Protected Activity In September 2020.*

To evaluate Rabon's *prima facie* case, it is necessary to identify what, if anything, was Rabon's "protected activity" as his claims have changed over time. Rabon pled in his Amended Complaint that his protected activity was seeking accommodations in Pepco's progression testing process. See JA 222-223, Compl. ¶64 (asserting that he "engaged in protected activities when he sought accommodations" from Pepco). Rabon sought accommodation only twice: first, in August 2019, from Exelon relating to his pre-employment testing, and second, in September 2020, from Pepco when he requested to retake the progression test with accommodations. JA 229-234; JA 537 ¶7. Indeed, the Amended Complaint confirms that when Rabon described seeking "accommodations," he meant seeking testing accommodations. JA 215-223, ¶¶11-13, 20-23, 44-45, 64. In deposition,

Rabon denied making any other requests for accommodation. JA 84, 553, Rabon Dep. 221:22-222:10. Thus, justice requires that this Court only consider Rabon's requests for accommodation with respect to his testing as the protected activity for purposes of his retaliation claim.

In opposing summary judgment, Rabon has changed his tune, claiming that having taken medical leave "through February 15" was his protected activity. Rabon's new assertion amounts to an unpled claim that must be rejected on summary judgment. See, e.g., Harris v. Trs. of the Univ. of the Dist. of Columbia, 567 F. Supp. 3d 131, 154 (D.D.C. 2021) (rejecting plaintiff's attempt to add an alleged adverse action during summary judgment briefing because "[i]t is axiomatic that a party may not amend [her] complaint through an opposition brief.") (internal citations omitted); Cloud Found., Inc. v. Salazar, 999 F. Supp. 2d 117, 127 (D.D.C. 2013) ("Defendants are entitled to fair notice of claims advanced in litigation. New claims cannot be pled in summary judgment briefs.")

Even if the Court would entertain such a theory, Rabon has not cited to any case suggesting that the DCHRA would recognize the act of taking sick leave as "protected activity." He cites only two cases involving DC law, and neither hold that taking sick leave is sufficient to show "protected activity." In Turner v. District of Columbia, 383 F. Supp.2d 157, 178-179 (D.D.C. 2005), the plaintiff' engaged in protected activity by filing a complaint with the DC Office of Human

Rights,[22] and in Grant v. May Dep't Stores Co., 786 A.2d 580, 583 (D.C. 2001), the plaintiff engaged in protected activity by filing an EEOC Charge.[23]

Rabon's citations to ADA cases from other jurisdictions do not help him demonstrate he engaged in any protected activity under the DCHRA. In Guinup v. Petr-All Petroleum Corp., 786 F. Supp. 2d 501, 514-515 (N.D.N.Y. 2011), the court found that plaintiff's request for immediate medical leave was protected activity, and that a fact issue remained as to whether her termination five days later was motivated by that request. There is no parallel to Guinup: Rabon first requested sick leave on September 28 and his termination was not initiated until many months later, and only after he refused to return to work at the expiration of his approved leave. Conoshenti v. Publ. Serv. Elec. & Gas Co., 364 F.3d 135, 151

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[22] Citing to Turner, Rabon incorrectly asserts that Pepco could be held liable for "pressuring him to return to work." Brief at 37. In Turner, plaintiff's employer changed how it responded to her sick leave after she filed a complaint; she was "coerced to limit certain medical and dental appointments" and denied use of sick days. 383 F. Supp.2d at 179. Rabon has not shown any change in treatment resulting from his having taking leave except that he was expected to return at its conclusion. Any such claim would fail because this alleged "pressuring" was nothing more than a "petty grievance," Clemmons v. Acad, for Educ. Dev., 70 F. Supp. 3d 282, 301 (D.D.C. 2014), because Pepco's attempts to return Rabon to work were not "adverse" to him, and because Pepco was not motivated to return him to work to punish him for taking leave.

[23] Rabon argues that it would be wrong to grant summary judgment on plaintiff's retaliation claim merely because he did not *actually* have a disability. Brief at 32-33, citing Grant, 786 A.2d at 586. This argument is irrelevant. Pepco has not argued that Rabon's retaliation claim fails because he has not proven the existence of any disability, nor did the lower court make any such ruling.

(3rd Cir. 2004) does not hold, as Rabon claims, Brief at 32, that requesting leave constitutes "protected activity" for purposes of any retaliation claim; it merely acknowledges that leaves of absence are one type of reasonable accommodation permitted under the ADA. The language in Dove v. Cmty. Educ. Ctrs., Inc., Civ. Action No. 12-4384, 2013 U.S. Dist. LEXIS 170081, 2013 WL 6238015 (E.D. Pa. Dec. 2, 2013) is similar to Conoshenti, but Rabon's treatment of it is even more troubling. He purports to quote the court in Dove, but add words to twist the court's meaning.[24] Rabon's citation to Belk v. Branch Banking & Trust Co., 2016 U.S. Dist. LEXIS 105644, *12 (S.D.Fla. Aug. 9, 2016) also has no bearing on this case as it was analyzing a claim under Florida law, characterizing what the ADA allows, and saying nothing about the DCHRA.

Even assuming *arguendo* that termination shortly upon returning from a medical leave *could* constitute retaliation for the protected activity of either requesting or taking leave, that is not what happened here. Rabon refused for more than three weeks to return from his leave once Pepco and his doctor agreed that nothing was preventing him from returning to work. The termination process was

[24] Compare Dove, 2013 U.S. Dist. LEXIS at *63 ("Moreover, numerous courts have recognized that a request for a leave of absence for medical treatment may constitute a request for reasonable accommodation under the ADA.") with Brief at 32, purporting to quote Dove, *63 ("[N]umerous courts have recognized that a request for and taking a leave of absence for medical treatment may constitute a request for accommodation under the ADA and thus constitute protected activity.") (underline indicates words added by Rabon).

initiated on or about February 3 after he violated Pepco's three-day Job Abandonment policy. Rabon's refusal to return to work absent medical justification, which undoubtedly was the catalyst for his termination, is in no way similar to an employer deciding to terminate an employee who promptly returns after approved medical leave expires.

2. *Rabon Has Offered No Evidence of Causation or Retaliatory Motive*.

The reason for Rabon's shifting narrative as to his protected activity becomes clear when the analysis turns to causation. While temporal proximity can alone suffice to establish causation for purposes of a retaliation claim in some cases, the proximity must be "very close." Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001); see also Taylor v. Solis, 571 F.3d 1313, 1322 (D.C. Cir. 2009) (rejecting interval of two and a half months between protected activity and adverse action as insufficient, without more, to establish causation for retaliation claim); Nicola v. Wash. Times Corp., 947 A2d 1164, 1175 (D.C. 2008). Because there are more than four months between Rabon's last request for testing accommodation and the initiation of termination proceedings in February 2021 (and more than five months before his March termination), he cannot rely on temporal proximity to raise an inference of causation with respect to any request related to his claimed learning disability. Further Rabon has not even alleged – much less offered competent evidence of – any other facts beyond Pepco's mere

knowledge of his testing accommodation requests to establish causation. Mokhtar v. Kerry, 83 F. Supp. 3d 49, 80-81 (D.D.C. 2015). Accordingly, his *prima facie* case fails for lack of a causal link.

Having now claimed that his sick leave constitutes protected activity, Rabon attempts to prove causation through an incomplete and misleading timeline. According to Rabon, he was on approved leave until "February 15" when he was cleared to return to work, he was terminated one month later, on March 16, and given the one-month temporal proximity, retaliation must have been the motive.[25] But Rabon's timeline is simply wrong. Rabon requested leave on September 28, and that leave was approved through January 26. After he failed to return to work for more than three days, Pepco initiated termination procedures for his violation of the Job Abandonment policy on February 3, and that process continued through several letters and meetings until the final approval of his termination on March 16, 2021. Rabon's intervening act – his attempt to rescind his job abandonment on February 18 by providing a note stating that he could have returned to work four

[25] Rabon misstates the record when he claims that Pepco had notice "on February 15, 2021" that he was cleared to return to work. Brief at 36. Rabon's own documents and testimony prove it to be untrue. Rabon did not forward his release note until the evening of February 18. JA 74-77, Rabon Dep. 185:10-186:1, 192:7-10; JA 306-307, JA 549-550, Rabon Dep. at 191:16-192:6 ("Q. Okay. Before February 15 – let me ask you this: You provided that note to Marsha Byas a few days after it was dated, right? A. That is correct. Once she made communication with me on the night of the 18th – February 18, 2021, she reached out to me."); JA 524 ¶32.

days prior – does not amount to protected activity, and does suddenly convert Pepco's legitimate non-retaliatory motive for termination (enforcing its job abandonment and progression testing policies) into unlawful retaliation.[26]

B. There Is No Other Evidence Of Any Retaliatory Motive for Termination Decision.

Because Pepco has already established its legitimate non-discriminatory reasons for its termination decision, to survive summary judgment Rabon must offer competent evidence from which a reasonable jury could conclude that Pepco's reasons were both false and a mere pretext to disguise retaliation. Rabon has no such evidence. As discussed above, Rabon cannot demonstrate that Pepco did not believe its own reasons. Similarly, he cannot show that retaliation for requesting an accommodation motivated the decision. The fact that Pepco included Rabon's original failed test, which by contract would require termination, when it documented the reasons for his termination in no way suggests that anyone at Pepco turned against Rabon, or was perturbed, *because* he had requested a

[26] Rabon suggests that there was something nefarious in Byas's not providing the note to Gentry-May or others who would be on the Continued Employment call on February 19, 2021. Brief at 37. It is nothing of the sort. Pepco's HR staff and supervisors are not supposed to be privy to an employee's medical information, and decisions with respect to medical information, such as certifying or decertifying leave, or determining whether a medical note justifies an employee's absence, are conducted by OHS which is staffed by nurses and nurse practitioners. JA 112, Gentry-May Dep. 53:7-20; JA 188, Gentry-May Dec. ¶22; JA 193-194, Byas Dec. ¶¶7-8; JA 198-200, Thompson Dec. ¶¶2-3, 10-14.

retest. Nor has Rabon offered any evidence that Pepco wanted to terminate him to because he took approved leave through January 26, or to prevent him from returning. It was plainly the refusal to return to work, not the request for leave, that motivated the termination.

Rabon alleges, without any evidentiary support, that this Court could find pretext because Pepco allegedly violated its own policies, Brief at 35, but it did no such thing. Rabon suggests that Pepco was required to accept *any* medical documentation under its Job Abandonment policy, but the policy actually requires an absent employee to provide "documentation supporting the reason for the absence from work." JA 290. Pepco adhered to its interpretation of this policy in finding that Rabon's documentation – a conclusory note based only on his request – was insufficient. Thus Rabon has not offered any evidence of Pepco's deviation from its own policies.[27]

III. Summary Judgment Was Proper on Rabon's CSEA Claim

Summary judgment should also be affirmed on Rabon's Count III, a claim under the Covid-19 Support Emergency Act ("CSEA"), which expanded the D.C.

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[27] Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998) did not find the "honest belief" doctrine "incompatible" with the ADA. The court adopted the doctrine where an employer can "establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." 155 F.3d at 808. Here, Pepco has identified particular facts showing that Rabon's continued absence was not justified. JA 538-543 ¶¶ 18-29.

Family and Medical Leave Act ("DCMLA") to protect individuals forced to isolate or quarantine as a result of Covid. D.C. Code § 32-502.01; Ex. 14 ¶¶73, 75.

Rabon was entitled to leave under the CSEA only for the period of time during which he was required to isolate or quarantine. See D.C. Code §32.502.01(a) (1)(2020) (now expired) (entitling employees to leave "if the employee is unable to work due to . . . [a] recommendation from a health care provider that the employee isolate or quarantine . . ."). Thus, Rabon's entitlement to CSEA leave ended when he was no longer required to quarantine as of October 22, 2020. JA 132, Rifino Dep. 43:12-21.[28]

To prove a CSEA violation, Rabon would need to offer competent evidence from which a jury could find that Pepco terminated him because the leave he took while quarantined.[29] Rabon has no such evidence. Instead, Pepco provided Rabon

[28] The statute also included provisions permitting leave to be taken due to "a need to care for" a family member "who is under [an order] to quarantine or isolate" or a "child whose school or place of care is closed or whose childcare provider is unavailable to the employee." D.C. Code §32-502.01(a)(2)-(3). Rabon has not alleged that he took leave to care for a quarantined family member or child whose school had closed, and so these other CSEA entitlements are inapplicable.

[29] Rabon argues that the trial court "held there was no violation of the CSEA because Pepco allowed Rabon to quarantine for 14-days," Brief at 38, but that is not an accurate description of the court's ruling. The court correctly ruled the CSEA is "only applicable to the quarantine period between when Plaintiff first tested positive on October 8, 2020, and fourteen days later, on October 22, 2020," and then concluded that Rabon had offered no evidence that Pepco retaliated against him for taking that CSEA protected leave. Order at 22.

with more leave than the CSEA required and then made significant efforts to reinstate him. Pepco permitted Rabon to take paid leave through December 20 and unpaid, but approved, leave through January 26, exceeding even the maximum 16 weeks allowed by CSEA. JA 538 ¶¶12-14, 17. Then, once his leave was no longer medically justified, Pepco's OHS and HR representatives communicated with Rabon repeatedly in an effort to return him to work promptly. JA 539-542 ¶¶20, 27, 28. It was at Rabon's election – not Pepco's – that he did not return to work in the days and weeks following his decertification on January 26, 2021. JA 542-543 ¶29. Pepco's actions toward Rabon are consistent with an employer trying to return an employee to productive work, and entirely inconsistent with a motivation to retaliate against someone for having taken CSEA leave.

Rabon suggests that he was entitled to use the full 16 week leave "to care for himself" in addition to the required period of quarantine or isolation. Brief at 37. He is incorrect; there is no language in the statute to support his assertion. The CSEA did not provide any leave after the period of isolation or quarantine expired, D.C. Code §32-502.01(a), and Rabon was not otherwise entitled to DCFMLA leave because he had not worked long enough for Pepco to be eligible for such leave or protection. D.C. Code §32-501(1)(A). Other provisions of the statute confirm that CSEA was limited to providing leave necessitated by legally imposed quarantines and school closures. See D.C. Code §32.502.01(a)(2) (providing leave

based on "[a] need to care for a family member . . . who is under a government or health care provider's order to quarantine or isolate"), (3) (providing leave based on "[a] need to care for a child whose school or place of care is closed…"). For his expansive claim, Rabon appears to rely solely on the header used by OHR in its Enforcement Guidance, where it captions the leave provided by subsection (a)(1) of the act as "Care for Self." Brief at 37, citing to OHR Enforcement Guidance. Accepting Rabon's reading would expand the law dramatically, extending the existing DCFMLA medical leave protections to employees like Rabon who did not yet qualify. Such a reading is inconsistent with OHR's guidance on the law. JA 493 (noting that CSEA had "No Effect on Traditional Family and Medical Leave," and stating that "CSEA does not change the definitions of employer and employee, or eligibility for traditional family and medical leave entitlements . . . "). It would also read out of the legislation the key requirement, that one must be ordered to "quarantine or isolate." JA 492 (requiring "a recommendation from a healthcare provider to quarantine or isolate.").

CONCLUSION

Thomas Rabon was employed by Pepco for just over two months when, knowing he failed the progression test that would result in the loss of his employment, he asked Pepco to let him retake the test and Pepco agreed. Rabon did not sit for the retest, left work and never returned. Pepco sought to return Rabon to work when his absence was no longer medically justified and, for more than three weeks, Rabon refused, despite repeated warnings that his continued absence constituted job abandonment. Eventually, when he knew – for the second time – that his termination was imminent, Rabon relented and submitted a note stating that he could return to work. But this time, Rabon's last ditch effort to save his job was too little, too late. Rabon's note offered no medical justification for his three-week refusal to return to work, and Pepco moved forward with the termination process already underway. Rabon suffered no injustice at Pepco's hands, and summary judgment should be affirmed on each of Rabon's claims.

Respectfully submitted,

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RELEVANT STATUTORY PROVISIONS

D.C. Human Rights Act

D.C. Code Section 2-1401.02. Definitions.

The following words and terms when used in this chapter have the following meanings:

…

5(A) "Disability" means a physical and mental impairment that substantially limits one or more of the major life activities of an individual[,] having a record of such an impairment or being regarded as having such an impairment.

D.C. Code Section 2-1402.11. Prohibitions.

(a) General. – It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially, for a discriminatory reason based on the actual or perceived: . . . disability . . . of any individual:

> (1)(A) By an employer. – To fail or refuse to hire, or to discharge, any individual; or to otherwise discriminate against any individual, with respect to his or her[s] (sic) compensation, terms, conditions, or privileges of employment, including promotion . . .

D.C. Code Section 2-1402.61. Coercion or retaliation.

(a) It shall be an unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of, or on about of having exercised or enjoyed, or on about of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under this chapter.

Covid-19 Support Emergency Act

D.C. Code Section 32-502.01 (2020) (since repealed)

(a) During the COVID-19 public health emergency, an employee shall be entitled to family and medical leave if the employee is unable to work due to:

> (1) A recommendation from a health care provider that the employee isolate or quarantine, including because the employee or an individual with whom the employee shares a household is at high risk for serious illness from COVID-19…

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2024, the following individuals were served by e-mail notification from the Court's filing system:

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